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No. 85-94

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ZIMMER PAPER PRODUCTS INCORPORATED,
Petitioner,

v.

BERGER & MONTAGUE, P.C.; DAVID BERGER; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; RAWLE & HENDERSON; ARNOLD LEVIN; KOHN, SAVETT, MARION & GRAF, P.C.; HAROLD KOHN; and FINE, KAPLAN & BLACK,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BEST AVAILABLE COPY

BRIEF OF RESPONDENTS BERGER & MONTAGUE, P.C.; DAVID BERGER; GROSS & SKLAR ASSOCIATES; WARREN RUBIN; KOHN, SAVETT, MARION & GRAF, P.C.; HAROLD KOHN AND ARNOLD LEVIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Contending that it never received notice of a settlement reached in antecedent antitrust litigation, petitioner Zimmer Paper Products Incorporated ("Zimmer") instituted this state law malpractice action in diversity against the attorneys who had served as class counsel in the antitrust proceedings and sought damages equal to the amount it claims it would have received if it had filed a proof of claim. The district court found, on the basis of a fully discovered record, that Zimmer had failed to make out a claim of professional negligence since class counsel had scrupulously adhered to the notice procedures mandated by the district court in accordance with the dictates of due process and Federal Civil Procedure Rule 23. Therefore, in the event that Zimmer's Petition For A Writ Of Certiorari were to be granted, the question presented would be:

Did the Court of Appeals properly affirm the district court's conclusion that a claim of legal malpractice could not be sustained where it was established that class counsel, in strict accordance with custom and with court-approved notice procedures fully complying with the requirements of due process and the Federal Rules of Civil Procedure, disseminated a settlement notice by first-class mail and by publication?

PARTIES TO THE PROCEEDING

Although Avram G. Adler, Marvin I. Barish and Howard J. Creskoff are listed among the Respondents on the cover of the Petition For A Writ Of Certiorari, those individuals were dismissed from the case in the district court by stipulation of the parties, approved by the district court, and they were not parties to the proceedings in the United States Court of Appeals for the Third Circuit. Otherwise, the cover of the Petition accurately lists the parties.

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COUNTERSTATEMENT OF THE CASE

Zimmer's abbreviated Statement of the Case omits numerous key facts and is inaccurate in other respects.[1]

1. For example, Zimmer states that "it is undisputed that . . . Zimmer never received the November 10 Notice." Petition at 4. In fact, Zimmer never proved its non-receipt of the November 10 no-

Respondents, therefore, submit a detailed statement of the case in order fully to apprise this Court of the record and to correct the omissions, misstatements and improper inferences contained in Zimmer's Petition For A Writ Of Certiorari ("Petition").

I. INTRODUCTION

This is a diversity action alleging *malpractice*. Zimmer was a class member in antecedent antitrust litigation before the United States District Court for the Eastern District of Pennsylvania. Instead of litigating its present grievance in that docket, however, Zimmer invoked the district court's diversity jurisdiction and instituted this separate *malpractice* proceeding against counsel for the class. Two negligence claims were asserted. First, Zimmer contended that counsel for the class were negligent in recommending to the district court that settlement notice be sent to class members by first-class mail and publication and in failing to employ a follow-up procedure. Second, Zimmer asserted that counsel for the class negligently executed the court-ordered mailing.[2]

After Zimmer was accorded full opportunity for discovery, the Honorable Louis H. Pollak — proceeding throughout with caution and careful consideration of Zimmer's position — entered judgment in favor of Respondents. That judgment was affirmed by the Court of Appeals. *Zimmer Paper Products, Inc. v. Berger & Montague*, 758 F.2d 86 (3d Cir. 1985).[3]

NOTES *(Continued)*

tice. This fact always was and still is vigorously disputed by the Respondents.

2. Zimmer now appears to have abandoned this second negligence claim. Petition at *i*, 9-10.

3. The Third Circuit opinion is reproduced in the Appendix to Zimmer's Petition. Citations to the Appendix are designated "A."

II. DETAILED STATEMENT

A. Background

On or about March 3, 1980, class actions on behalf of purchasers of glassine and greaseproof paper were filed against six manufacturers and sellers of such paper (collectively, "the Class Action Defendants"), who were alleged to have engaged in an unlawful conspiracy to fix, raise, maintain or stabilize the prices of glassine and greaseproof paper in violation of federal antitrust laws. C.A.A.312-13.[4] The actions were subsequently consolidated as the *Glassine and Greaseproof Paper Antitrust Litigation*, M.D.L. Docket No. 475 ("Antitrust Litigation"), and a plaintiff class, of which Zimmer was a member, was certified. C.A.A.14-27, 312-14.

B. June 1, 1981 Notice

After settlement agreements were negotiated with three of the Class Action Defendants, the district court ordered that notice be mailed to all class members ("the June 1 notice") and published in all regional editions of *The Wall Street Journal*, informing class members, *inter alia*: (a) that the Antitrust Litigation had been instituted on their behalf; (b) that partial settlements of that Litigation had been proposed; and (c) that, if any class member desired to be excluded from or "opt-out" of the class, such member must so advise the district court. A.3; C.A.A.32-37.

Respondents, as counsel for the class (collectively, "Class Counsel"), retained three highly qualified firms to effectuate this court-ordered mailing. A.3. Initially, a list of potential class members was obtained from the Class

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4. Citations to the joint appendix filed in the Court of Appeals are indicated by the notation "C.A.A."

Action Defendants.[5] C.A.A.33. This list then was supplied to Provcor Services, Inc. ("Provcor"), a subsidiary of the Provident National Bank, which placed each and every name and address and each and every variation thereof (regardless of how slight the deviation) on a computer list. A.4; C.A.A.171-79, 184-86. The accuracy of these names and addresses was then verified by Provcor. A.4; C.A.A.172-73. Thereafter, the computer list was used to generate gum-backed mailing labels for the June 1 notice. A.4; C.A.A.178-79. Also, since Provcor's mailing permit number was used on the class notices, Provcor was responsible for delivering the June 1 notices to the United States Postal Service. A.4; C.A.A.192-93.

VPI Reproductions, Inc. ("VPI") was retained to print and prepare the mailings. A.4; C.A.A.132-34. VPI subcontracted this job, as it did similar printing jobs, to Fischler Printing & Office Products ("Fischler"). A.4; C.A.A.129, 135-138. Bartholomew J. Milano ("Milano"), then an employee of VPI, worked with Class Counsel, Fischler and Provcor to insure that the June 1 notices were properly printed, folded, addressed and mailed. A.4; C.A.A.138, 143, 168-69, 219-23, 229. Milano delivered to Provcor for mailing copies of the June 1 notice. C.A.A.140, 143.

On June 1, 1981, separate notices were mailed by first-class mail to each class member for each name and address variation that appeared on the computer list. In total, 2,928 notices were mailed to the approximately 1,550 members of the class. A.4; C.A.A.100-01, 181-82. Seven separate June 1 notices were mailed to Zimmer: four to Zimmer's Indianapolis office and three to its San Francisco office. A.4; C.A.A.52, 102. Although the president of Zimmer arbitrarily threw away the duplicative

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5. In its Petition, Zimmer represents that the list of potential class members was compiled by Class Counsel from sales invoices and records of the Class Action Defendants. This representation is inaccurate and without support in the record.

copies of the June 1 notice, Zimmer *admits that it received at least six copies* of the June 1 notice. A.4; C.A.A.273-75, 314.

Zimmer took no action after its receipt of the June 1 notice. C.A.A.315. Specifically, Zimmer failed to object to the use of first-class mail or take any steps whatsoever to challenge the notification procedure approved by the district court in connection with the June 1 notice.

C. November 10, 1981 Notice

After settlement agreements were negotiated with the remaining three Class Action Defendants, the district court ordered that a *second notice* ("the November 10 notice"),[6] with a proof of claim form attached thereto, be mailed to class members. The Court further ordered that a summary of the November 10 notice be published in all regional editions of *The Wall Street Journal.* A.3; C.A.A.40-42.

The November 10 notice advised class members, *inter alia*: (a) that settlement by the remaining three Class Action Defendants was proposed; (b) that a settlement fund resulting from all of the settlements was available for distribution to class members; and (c) that the claim form attached to the notice must be completed and returned to the Clerk of the District Court no later than February 1, 1982 in order to enable a class member to share in the settlement fund. A.3; C.A.A.43-48.

The evidentiary record shows that Class Counsel fully complied with the order of the district court and carefully caused seven copies of the November 10 notice

6. Throughout its Petition, Zimmer bemoans the "fact" that the notification process consisted of a *single* first-class mailing. Zimmer fails to advise this Court that *seven* copies of *two* separate notices — the June 1 notice and the November 10 notice — were mailed to it and that it admittedly received at least *six copies* of the June 1 notice. A.4.

to be mailed to Zimmer.[7] The following key facts with respect to the preparation and mailing of the November 10 notice are undisputed.

1. Following procedures similar to those employed in sending the June 1 notice, Provcor once again generated gum-labels from its original computer list of purchasers. A.4; C.A.A.101, 183-84, 203. The labels were printed on folded, continuously-fed computer sheets. C.A.A.150.

2. VPI made two photocopies of the actual address labels prepared by Provcor for the November 10 mailing. C.A.A.148-51. These photocopies prove that seven such labels (Label Nos. 3709-3713, 3715, 3716) were addressed to Zimmer: four to its Indianapolis office and three to its San Francisco office. A.4; C.A.A.52.

3. On November 10, 1981, Provcor mailed approximately 3,000 notices and proof of claim forms by first-class mail to the same purchasers on Provcor's computer list to whom the June 1 notice was sent. A.4; C.A.A.100-01, 191-93, Affidavit of J. Edward Goff, IV ("Goff Affidavit"), Exhibits J and K.[8]

4. Claim forms mailed to Zenith Specialty Bag Co. (whose mailing label, No. 3702, appeared on the page

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7. Zimmer has asserted that it did not receive the November 10 notice. However, the most Zimmer could prove was its *non-awareness* of receipt of that notice. Mail from Philadelphia to Indianapolis takes approximately three to four days. C.A.A. 314. The November 10 notice would have been received by Zimmer on or about Friday, November 13 or Monday, November 16, 1981 (following the intervening weekend). However, the week of November 16 was an unusually disrupted period at Zimmer. Karl Zimmer, the President, and the first person to whom mail customarily was forwarded, was in Atlanta, Georgia on a business trip. C.A.A. 268, 176-78. The three principal backup officers responsible for reviewing Zimmer's mail were also out of town on business. C.A.A. 251, 254-55, 266-67, 304-06. The sole remaining manager was preoccupied with the installation of a new IBM computer and did not remember any piece of mail received by Zimmer that week. C.A.A. 211-17.

8. The Goff Affidavit was filed with the district court on June 2, 1983. Its table of contents is reproduced at C.A.A. 11-13.

preceding Zimmer's) and Zorn Packaging Inc. (whose mailing label, No. 3723, appeared on the same page as Zimmer's) were subsequently filed by them in the Antitrust Litigation. A.4; C.A.A.51-52, 76-79. Proof that claims were filed by these class members also confirms the fact of mailing. A.4; C.A.A.56-79.

5. A twenty-square inch summary of the November 10 notice was published in all regional editions of *The Wall Street Journal.*[9] Zimmer subscribed to that publication at all relevant times, and a copy of the midwest regional edition was mailed to Zimmer at its Indianapolis office. A.3; C.A.A.97.

In accordance with the November 10 notice, a hearing was conducted and the district court approved the proposed settlements and a proposed plan of pro rata distribution.[10] Approximately 12% of the class members filed proofs of claim and received payments equal to 5.06% of their dollar purchases.[11] C.A.A. 56.

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9. Notice was published in the southwest regional edition of *The Wall Street Journal* on November 13, the east regional edition on November 16 and the midwest and west regional editions on November 17, 1981. Goff Affidavit, Exhibit J.

10. The distributions ranged from $1,682,009.35 to $21.28. A.10; C.A.A. 56-73.

11. Zimmer's assertion that a 12% response rate is low proves nothing. It is significant that the one survey of class action response rates which Class Counsel was able to locate points in exactly the opposite direction. Herbert B. Newberg, in his treatise on class actions, undertook to survey claim response rates among a variety of classes, including antitrust classes. Among antitrust cases surveyed, claims filed as a percentage of total class members ranged from 0.28% to 43.87%. Newberg, *Class Actions* Appendix 8-4, Table I at 206-09 (2d ed. 1985). The Newberg figures reveal, among others, a 4.65% response rate for a class smaller than that certified in the Antitrust Litigation and a 7.8% response rate for a slightly larger class of 2400 class members. *Id.*

D. District Court Proceedings

In the present diversity malpractice action, Zimmer contends that it was deprived of the opportunity to partake of the settlement proceeds in the Antitrust Litigation because it allegedly did not receive the November 10 notice. C.A.A.320. Zimmer advanced two negligence claims: (1) Class Counsel were negligent in recommending that settlement notice be sent to class members by first-class mail and in failing to employ a follow-up procedure and (2) Class Counsel negligently executed the court-ordered mailing. A.5; C.A.A.322.

In response, Class Counsel filed motions to dismiss or, in the alternative, for summary judgment. On August 2, 1983, the district court granted partial summary judgment, dismissing most, but not all, of Zimmer's Complaint. A.5, 36-37. The district court held that Class Counsel had not committed malpractice because they had fully complied with the customary notice procedures approved by the court and because they had no duty to follow-up further. A.5, 36-37. The district court specifically ruled that "[f]irst class mailing is sufficient to satisfy the notice requirement of Federal Rule of Civil Procedure 23(e)." A.37. However, Judge Pollak permitted Zimmer to proceed with discovery of its claim, not pressed here, that Class Counsel "negligently failed to carry out the proper procedures in mailing the notice [and proof of claim form] first class." A.37.

Zimmer thereafter conducted extensive discovery, inquiring into the generating, printing, folding, addressing, mailing and handling of the November 10 notice. A.5. Upon completion of all discovery, Class Counsel again filed motions for summary judgment. The crux of these motions was threefold.

First, despite Zimmer's extensive discovery, there was no evidence suggesting that Class Counsel failed to select qualified firms to effectuate the mailings of class notices. To the contrary, the uncontroverted evidence

proved that Class Counsel met their duty to select highly qualified firms to print and mail the class notices. Further, the undisputed facts proved that the address labels generated by Provcor, seven of which were addressed to Zimmer, were affixed to copies of the November 10 notice and that such notices were mailed to Antitrust Litigation class members. A.4; C.A.A.52, 101-03. Indeed, such notices were mailed to, and received by, a class member whose address label appeared on the same page as Zimmer's labels. A.4; C.A.A.52, 78-79. Second, even assuming, *arguendo*, that Class Counsel, Provcor, VPI or Fischler may have been negligent in some aspect of the mailing — which they were not — Zimmer failed to show that any such negligence caused the November 10 notice not to be mailed to Zimmer. Third, regardless of such mailing, Zimmer was a subscriber to *The Wall Street Journal* and was at leas notified by publication since a summary of the November 10 notice was published in a copy of the *Journal* mailed to Zimmer. A.3; C.A.A.97.

Only after virtually being forced to do so, Zimmer finally responded to Class Counsel's summary judgment motions.[12] However, despite extensive discovery, Zimmer could only claim that a variety of "safeguards" were not taken (without offering any proof that Class Counsel had a duty to employ such "safeguards") and that several individuals whose firms were involved in the mailing process could not recall every detail of each stage of the mailing. Zimmer then invited the district court to *speculate* that labels and notices *might* have been lost or misplaced.

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12. Initially, Zimmer filed only a patently inadequate three-page, conclusory and unsupported response to Class Counsel's motions for summary judgment. However, by Order dated March 27, 1984, the district court *sua sponte* gave Zimmer an opportunity to "supplement" its deficient response. A.31-32. By that March 27 Order, the district court also held that publication in *The Wall Street Journal* was not by itself sufficient to entitle Class Counsel to summary judgment. A.30.

On May 30, 1984, the district court granted Class Counsel's motions for summary judgment, finding that Zimmer "presented no evidence which indicate[d] that VPI or Fischler negligently failed to affix all 2928 labels or that Provcor negligently failed to mail all 2928 notices." A.26. That May 30, 1984 Order, together with the earlier Orders, disposed of this case in its entirety. A.22-27.

E. Third Circuit Court of Appeals Proceedings

On June 25, 1984, Zimmer appealed from the district court's Orders. In a lengthy opinion, the Court of Appeals for the Third Circuit affirmed all aspects of the district court's judgment. A.1-15.

The Court held that Class Counsel were neither negligent in recommending the use of first-class mail and publication nor in their execution of the mailing.[13] In particular, the Court of Appeals found that Class Counsel satisfied their fiduciary duty to notify class members by employing first-class mail and publication, procedures that are traditionally used and accepted throughout the United States and that fully complied with due process requirements, Federal Rule of Civil Procedure 23 and customary practice among class action counsel.

> The bounds of fiduciary duty are undoubtedly not easy to define, but certainly *we must be guided by the fact that the practice here alleged to breach such duties is a customary one, and has been approved, after careful judicial scrutiny, not only in this case but in legions of others.* If class counsel in this case have breached their fiduciary duties, attorneys throughout the country who have complied with court orders and a Supreme Court-approved notice

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13. The dissent did not take issue with the majority's affirmance of Judge Pollak's ruling that Zimmer had failed to establish that the November 10 mailing was negligently executed.

procedure may well be subject to malpractice lawsuits by anyone who alleges that he or she did not receive notice of the opportunity to file a claim.

A.9 (emphasis added; footnote omitted).

Dissatisfied with the Third Circuit's decision, Zimmer petitioned for rehearing in banc. Its petition was denied on April 19, 1985. A.40.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The sole issue before this Court is whether Class Counsel were negligent in selecting the procedure by which the November 10 notice was disseminated. Zimmer has failed to advance any reason why the district court's determination in this diversity action for *malpractice*, affirmed by the Court of Appeals for the Third Circuit, merits review. The decision of the Third Circuit was concededly not in conflict with that of any court of appeals nor with that of a state court of last resort. The courts below did not decide a federal question, much less an important federal question, in a manner which conflicts with applicable decisions of this Court or which calls for the exercise of this Court's supervisory powers. Indeed, as Zimmer's Petition For A Writ Of Certiorari makes clear, Zimmer raises no federal question at all. Rather, it seeks to reopen an issue of *legal malpractice* while, at the same time, conceding that it is unable to define a standard against which to gauge Class Counsel's performance.[14] The decisions of the courts below follow longstanding and controlling precedent, do not conflict with the decision of this Court or any court of appeals, and present no issue for review by this Court.

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14. This concession alone is fatal to Zimmer's malpractice action. *See* p. 14 *infra*.

II. ARGUMENT

A. The Sole Issue Addressed In Zimmer's Petition Is Whether The Courts Below Correctly Rejected Zimmer's Malpractice Claim.

In Pennsylvania, three essential elements must be established where, as here, a cause of action for malpractice or professional negligence is brought:

> 1. The employment of the attorney or other basis for duty;
>
> 2. The failure of the attorney to exercise ordinary skill and knowledge; and
>
> 3. That such negligence was the proximate cause of damage to the plaintiff.

Schenkel v. Monheit, 266 Pa. Super. 396, 405 A.2d 493 (1979) (affirming summary judgment against former client); *Gans v. Mundy*, 762 F.2d 338 (3d Cir. 1985) (applying *Schenkel* and affirming summary judgment in legal malpractice action). *See also*, *Hoyer v. Frazee*, 323 Pa. Super. 421, 426, 470 A.2d 990, 993 (1984) (standard of care in a legal malpractice case is whether the attorney has exercised ordinary skill and knowledge); *Lentino v. Fringe Benefit Employee Plans, Inc.*, 611 F.2d 474, 480 (3d Cir. 1979) (standard of care in malpractice action is measured by skill generally possessed and employed by practitioners of the legal profession).

In rejecting Zimmer's claim that Class Counsel were negligent in choosing to disseminate the November 10 notice by first-class mail, the courts below correctly applied the relevant standard: there can be no finding of malpractice in the absence of evidence that Class Counsel failed to exercise the skill and knowledge ordinarily exercised by class action counsel. Where, as the Third Circuit ruled, Class Counsel "has done all that is generally done, all that due process requires, and all that the court ordered," A.9, Zimmer's malpractice claim was

properly dismissed. Such dismissal gives rise to no issue worthy of *certiorari*.

Evidence of customary procedures and of procedures which have repeatedly been determined to satisfy the requirements of due process and the Federal Rules of Civil Procedure is not, as Zimmer misguidedly suggests at page 11 of its Petition, irrelevant to this action for professional negligence. On the contrary, it is the crux of this proceeding, since only proof that Class Counsel departed from the standard of care ordinarily exercised by attorneys would have been sufficient to make out a case of legal malpractice. Yet, the duties which Zimmer contends Class Counsel negligently failed to undertake have been deemed unnecessary by both class action practitioners and by the courts. *See* pp.15-21, *infra*. Even if such duties were to be mandated in the future, the failure to have done so in the past clearly would not constitute malpractice. *Cf. Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974) ("[w]e are loath to impose such a [notice] requirement retroactively").

Zimmer's insistence that Class Counsel had a "fiduciary duty" to do "more" than was done -- over and above adherence to the requirements of Rule 23 and due process and compliance with customary procedures and court orders — would, in effect, exceed the negligence standard clearly and unequivocally laid down for legal malpractice actions. Zimmer, however, has not cited this Court to a single precedent which would support this novel proposition.[15] The Third Circuit correctly recognized:

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15. The cases cited by Zimmer on pages 6 and 7 of its Petition, which address routine attorney-client disputes ranging from misappropriation of client funds, *Bar Association of Baltimore v. Marshall*, 269 Md. 510, 307 A.2d 677 (1973), to issues of confidentiality of client communications, *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2nd Cir. 1977) and conflicts of interest, *Baker v. Humphrey*, 101 U.S. 494 (1880), shed no light whatsoever on the issue presented for *certiorari*. *Greenfield v. Villager*

> [T]he practice here alleged to breach [the bounds of fiduciary] duties is a customary one, and has been approved, after careful judicial scrutiny, not only in this case but in legions of others.

A.9.

In its zeal to avoid the force of such authority, Zimmer goes so far as to assert that "[t]o date . . . no court has defined or delimited a workable standard of conduct against which class counsel's fiduciary obligation to absent class members can be measured." Petition at 6. Indeed, Zimmer professes to have been "unable to cite the Court of Appeals to a single reported decision which examined the nature and extent of an attorney's fiduciary duty to his client in the context of a federal class action," contending that there is a "virtual absence of any relevant authority in this area." Petition at 9. This is simply not correct, as is discussed below. However, if it *were* correct, Zimmer's inability to demonstrate a standard against which to measure Class Counsel's performance *would itself be fatal* to its malpractice action.

NOTES *(Continued)*

Industries, Inc., 483 F.2d 824 (3d Cir. 1973), the only case which seeks to define the parameters of Class Counsel's duty to communicate with absent class members, refutes Zimmer's position. In *Greenfield, no* individual notice was sent, by first-class mail or otherwise. Instead, notice of a securities class action settlement hearing was simply published "in two newspapers on two occasions several days apart during the East Coast summer vacation period." 483 F.2d at 830-31, 833. The failure to provide individual notice was, the court held, a breach of counsel's fiduciary duty. Where, as here, Class Counsel complied with customary practice and court order by mailing not one but seven individual notices to Zimmer, *Greenfield's* measure of the fiduciary duty has been fully satisfied.

B. The Decisions Below Are Consistent With Applicable Due Process Decisions of This Court.

Under the exacting standard of the Due Process Clause, this Court has specifically mandated the very notice procedure recommended by Class Counsel and ordered by the district court: "ordinary mail" to persons whose names and post office addresses are known and notice by publication to those whose interests or addresses are unknown. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950). *See also, Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974) (due process requires individual notice to class members by first-class mail). *Accord Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) (notice by mail meets constitutional precondition to a proceeding which will adversely affect a party's property interests).

This Court recently confirmed *Mullane's* continued vitality and upheld the use of first-class mail as the appropriate vehicle for the dissemination of important class action notices. In *Phillips Petroleum Co. v. Shutts*, ___U.S. ___, 105 S.Ct. 2965, 86 L.Ed. 2d 628 (1985), this Court held that due process requires that an absent member of a plaintiff class seeking money damages be accorded an opportunity to execute and return an "opt out" form and expressly found that the sending of such a notice by first-class mail satisfies due process.

Class Counsel mailed Zimmer not one, but *seven* copies of the November 10 notice, addressed variously to "Zimmer Paper Co.", "Zimmer Paper Products", "Zimmer Paper Products Inc." etc. In addition, a synopsis of the notice was published in a national publication to which Zimmer in fact subscribed. *Contrast Mullane*, 339 U.S. at 315. If their performance is measured against the standard set forth by this Court, it is clear that Class Counsel scrupulously adhered to and, indeed, exceeded the mandate of *Phillips Petroleum*, *Eisen* and *Mullane*.

C. Respondents Have Fulfilled Any Applicable Fiduciary Duty To Communicate With Class Members By Adhering To The Traditionally Accepted And Usual Course Of Class Action Proceedings.

The notice procedure approved here by the district court and fully carried out by Class Counsel was identical to notice procedures regularly ordered under each of the express notice provisions of Federal Civil Procedure Rule 23 — i.e., Rule 23(c)(2),[16] Rule 23(d)(2) and Rule 23(e).[17]

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16. Time and again, federal courts have concluded that first-class mail suffices to meet the standard of Rule 23(c)(2). *See, e.g., Cayuga Indian Nation v. Carey,* 89 F.R.D. 627, 632-33 (N.D.N.Y. 1981) (individual notice of class certification by first-class mail, coupled with notice by publication, satisfies the requirements of Rule 23); *Trist v. First Federal Savings & Loan Ass'n,* 89 F.R.D. 1, 2 (E.D.Pa. 1980) (individual mail to last-known address satisfies exacting "best practicable" standard of Rule 23(c)(2)); *Piel v. National Semiconductor Corp.,* 86 F.R.D. 357, 375 (E.D.Pa. 1980) (best notice practicable under Rule 23(c)(2) is notice by first-class mail); *Oneida Indian Nation of Wisconsin v. New York,* 85 F.R.D. 701, 709 (N.D.N.Y. 1980) (ordering individual notice of class certification by first-class regular mail and publication in *The New York Times*); *Brandt v. Owens-Illinois, Inc.,* Fed.Sec.L.Rep. (CCH Transfer Binder, '73-74 Dec.) ¶94,355 at 95,187 (S.D.N.Y. 1974) (directing that individual notice by first-class mail be given to all members of Rule 23(b)(2) and (b)(3) subclasses). *Cf. Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 167 & n.7, 173 (1974) (district court erred in failing to direct individual notice to all class members on grounds that first-class mailing was too costly). *See Manual for Complex Litigation* (Second) §41.4.1 (Feb. 1985 Draft) (directing notice of class certification to be given by first-class mail).

17. Under the standard of Rule 23(d)(2) and (e), first-class mail has repeatedly been deemed sufficient to apprise class members of a settlement and their entitlement to recover thereunder. *See, e.g., Walsh v. Great Atlantic & Pacific Tea Co.,* 726 F.2d 956, 960, 962-64 (3d Cir. 1983) (notice by first-class mail plus publication "clearly adequate" under Rule 23(e)); *State of West Virginia v. Chas. Pfizer & Co.,* 440 F.2d 1079, 1083 (2d Cir. 1971), *cert. denied,* 404 U.S. 871 (1971); *Williams v. Weirton Steel Div.,* 31 Fair Empl.

The Third Circuit carefully considered and rejected Zimmer's contention that the specific facts of this case warranted a departure from the overwhelming case law which holds that notice by first-class mail satisfies not only the mandate of Rule 23(e) but the more exacting standard of Rule 23(c)(2). In response to Zimmer's contention that a follow-up procedure was called for by the

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Prac. Cases (BNA) 1415, 1433-34 (N.D.W.Va. 1983) (directing notice of settlement to be sent by first-class mail); *Alliance to End Repression v. City of Chicago*, 561 F.Supp. 537, 546, 548 (N.D.Ill. 1982) (notice of settlement sent by first-class mail was "fair and adequate"); *Trist v. First Federal Savings & Loan Ass'n., supra*, 89 F.R.D. at 3 (Rule 23(e) does not demand perfect mailing; individual mail to last known address suffices); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 65 (N.D.Calif. 1976); *Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 227 (S.D.N.Y. 1973); *National Organization for Women v. Bank of California*, 5 Empl. Prac. Dec. (CCH) ¶8617 at 7809 (N.D.Calif. 1973). *See also Manual on Complex Litigation (Second), supra*, §§41.4.2, 41.4.3 (sample order for hearing on proposed class settlement directs notice by first-class mail).

In addition, federal courts have consistently approved the mailing plus publication of proof of claim forms for the participation in a settlement fund as an exercise of their supervisory powers over class actions under Rule 23. *E.g., Weinberger v. Kendrick*, 698 F.2d 61, 68-69, 71 (2d Cir. 1982), *reh. gr. in part, reh. den. in part*, CCH Fed.Secur.L.Rep. ¶99,074 (2d Cir. 1983), *cert. denied*, 464 U.S. 818 (1983) (proofs of claim filed as a result of notice by mail and publication superintended by district court under Rule 23); *In Re Gypsum Antitrust Cases*, 565 F.2d 1123, 1125-27 & n.5 (9th Cir. 1977) (court-ordered mailing of claim form describing procedure for participating in settlement fund was proper under Rule 23(d)(2); "it is fair and reasonable to proceed, as the district court did here, by mailing claim notices to last-known addresses of potential class members and by publication"); *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1184 (2d Cir. 1974) (district court properly ordered mailing and publication of notice fixing date for filing sworn statement of claim); *State of West Virginia v. Chas. Pfizer & Co., supra*, 440 F.2d at 1083 (2d Cir. 1971) (district court properly ordered notice of filing deadline for individual claims to be given to wholesaler-retailer class by first-class mail; consumer class members notified of claim filing deadline by publication); *Hinkley v.*

12% response rate to the November 10 notice, the Third Circuit noted:

> [T]he 12% response rate does not appear to be determinative. Although at first glance this response rate appears low, there has been considerable debate over whether or not it is in fact low. While the defendants have cited studies by Herbert Newberg, author of a treatise on class actions, to demonstrate that a 12% rate is in line with response rates in similar settlements, Zimmer has come forward with nothing to suggest that the rate is uncharacteristically low.

A.11 (citations omitted). *See* n.11 *supra*. The Third Circuit also weighed and rejected Zimmer's further contention that the amount of the settlement and the number of class members mandated a follow-up procedure. A.10.

Finally, Zimmer has not cited a single case in which any court has held that a class action counsel has a fiduciary duty to assure actual knowledge as to the contents of any notice or to follow up where class members

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NOTES *(Continued)*

DuPont, C.A. No. 82-1283 (E.D.Pa. 1982) (by Order dated November 23, 1982, court approved mailing of notice of settlement and proof of claim by first-class mail); *McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 65 (N.D.Calif. 1976) (notice of proposed class action settlement, advising class members of right to file a claim for a portion of settlement fund, sent by first-class mail); *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 622 (D.Colo. 1974) (requirements of Rule 23(e) satisfied by mailing of individual notice containing instructions regarding the filing of claims, together with publication of copies of the notice in *The Wall Street Journal*); *Bleznak v. C.G.S. Scientific Corp.*, 387 F.Supp. 1184, 1191 (E.D.Pa. 1974) (order directing mailing of proof of claim form by first-class mail pursuant to Rule 23(c)(2) and 23(d)); *Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 227 (S.D.N.Y. 1973) (directing the mailing of proof of claim forms by first-class mail, along with class notice). *See Manual on Complex Litigation (Second), supra*, §41.4.4 (directing dissemination of proof of claim forms by first-class mail).

fail to file claim forms.[18] On the contrary, federal courts have rejected attempts to impose upon attorneys any duty — fiduciary or otherwise — to perform extensive searches for missing addresses, to mail out notice by certified or registered mail, to effect personal service or to direct notice to counsel for class members who have instituted individual actions.[19]

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18. The cases cited by Zimmer at pages 11 and 12 of its Petition do not support the notice procedure it urges this Court to mandate retroactively. First, none imposes a follow-up requirement of the type Zimmer proposes here. Second, they are distinguishable on their facts. Three of the cases — *Commonwealth of Pennsylvania v. Local Union 542*, 555 F.Supp. 1109 (E.D.Pa. 1982); *Kyriazi v. Western Electric Co.*, 527 F.Supp. 18 (D.N.J. 1981), and *Vuyanich v. Republic National Bank*, 521 F.Supp. 656 (N.D.Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984) — involve notice to a plantiff class in employment discrimination cases where, as the Third Circuit recognized, A.11, class members are less sophisticated and less likely to heed a notice sent by ordinary mail. Similarly, *Payton v. Abbott Labs*, 83 F.R.D. 382 (D.Mass. 1979), *vacated*, 100 F.R.D. 336 (D.Mass. 1983) involved notice of certification of a class composed of girls and young women exposed to diethylstilbestrol *in utero*, a situation "where class members may be presumed to be less aware of a notice's ramifications." A.11. In *Liddell v. Board of Education*, 567 F.Supp. 1037 (E.D.Mo. 1983), registered mail was sent *only* to those who (unlike Zimmer) had submitted written comments on the settlement plan. Finally, in *Appleton Electric Co. v. Advance United Expressways*, 494 F.2d 126 (7th Cir. 1974), members of the plaintiff class were in fact sent notice by *first-class mail*. Notice by certified mail was sent only to members of the defendant class.

Entin v. Barg, 412 F.Supp. 508 (E.D. Pa. 1976), is also inapposite. In that securities action, the identity of many class members was obscured by the fact that many shares were held by brokerage houses in "street names" and that, in the intervening years, a large number of the brokerage houses had failed. 412 F.Supp. at 512. In light of those special and unusual circumstances, the court ordered that a service be engaged to find current addresses for potential class members.

19. *E.g., Mullane v. Central Hanover Bank and Trust Co., supra*, 339 U.S. at 317-18 ("impracticable and extended searches

Zimmer dismisses the abundance of case law directing notice in a manner identical to the procedure utilized here as mere evidence of custom. Petition at 11. Even if this were so, the courts below were certainly entitled in this malpractice action to consider such "custom" in concluding that the notice provided by Class Counsel was such notice as would be provided by an attorney exercising the skill and knowledge ordinarily exercised by class action counsel. But, of course, these cases are not mere evidence of what legal practitioners customarily have considered to be sufficient notice. More important, they reflect uniform acceptance by the courts of the sufficiency of the very notice procedure utilized here.

In sum, the decisions of the courts below are consistent with an extensive body of appellate and district court case law which holds that notice by first-class mail is sufficient. Zimmer's indirect challenge to the sufficiency of the notice procedure was properly rejected in this legal malpractice action since, as the Third Circuit correctly held, there was no breach of a fiduciary duty

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NOTES *(Continued)*

[for beneficiaries of a trust] are not required"); *National Student Marketing Litigation v. Barnes Plaintiffs*, 530 F.2d 1012, 1015 (D.C.Cir. 1976) (affirming order denying class members' motion for exclusion from the class made on grounds that class members purportedly never received notice of class certification; "[t]he fact that the Barnes plaintiffs had instituted an individual action imposed no obligation to treat them as unique and direct specific notice to [their] attorney"); *Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1185-86 (2d Cir. 1974) (there is no requirement that notice of a class settlement be sent to attorneys for members of the class who have instituted individual actions); *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627, 632-33 (N.D.N.Y. 1981) (certified mailing or personal service of notice of class certification was not required); *Waligunda v. Sperry Rand Corp.*, 25 F.R.Serv.2d 368, 371 (E.D.N.Y. 1978) (notice of class action settlement need not require return receipt); *Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 227 (S.D.N.Y. 1973) (expressly rejecting the suggestion that notice be sent by certified mail and directing first-class mailing of proof of claim).

where, as here, Respondents meticulously adhered to a widely accepted notice procedure approved not only by the district court here but also by "legions of others." A.9.

D. The Exercise of This Court's Supervisory Powers Is Uncalled For Particularly Where, As Here, The Very Structure Of Rule 23 Militates Against Zimmer's Action.

The thrust of Zimmer's Petition is, in essence, a collateral attack on the district court's original approval of the November 10 notice sent to the class.[20] Zimmer is

20. Zimmer's very ability to mount such an attack is problematic. *Lasky v. International Union (UAW)*, 638 F.2d 954 (6th Cir. 1981) suggests that, at the outset, Zimmer is collaterally estopped and barred by *res judicata* from challenging the notification procedure mandated by the district court. In *Lasky*, disgruntled class members asserted a malpractice claim against the class action attorney, alleging that the procedures used to notify class members of a proposed settlement did not adequately protect the interests of the class. The *Lasky* court, however, rejected the claim, finding that the class members were collaterally estopped from asserting that their legal representation was inadequate:

> "Since [the class members] had the opportunity to object to the legal representation at the prior settlement hearing and *since a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable,* which in turn was essential to approving the settlement, [*the class members] are collaterally estopped from now asserting that the legal representation was not adequate. . . .*"

Lasky v. International Union, (UAW), supra, 638 F.2d at 957 (emphasis added; citations omitted). Here, the procedure for communicating the November 10 notice which Zimmer attacks in this action — first-class mail plus publication — was identical to the procedure employed in communicating the June 1 notice to class members, six copies of which Zimmer admittedly received. A.3. Zimmer did not seek to challenge the adequacy of that notification procedure and, by failing to do so, Zimmer is collaterally estopped and barred by *res judicata* from challenging the adequacy of the identical notification procedure used in connection with the November 10 notice. *Lasky v. International Union (UAW), supra*, 638 F.2d at 957; *Cramer v. General Telephone & Electronics Corp.*, 582 F.2d 259, 266

requesting this Court to exercise its power of supervision to correct an injustice it allegedly suffered, not in this malpractice case, but in the Antitrust Litigation. One must, however, keep squarely in focus the fact that the notice procedure employed by Class Counsel not only fully complied with Rule 23 of the Federal Rules of Civil Procedure, due process requirements, and notice procedures customarily employed by class action counsel, but also was ordered and approved by the district court in the context of ongoing class action litigation.

Zimmer seeks to isolate Class Counsel as being responsible for what it asserts to be an inadequate notice procedure and argues that Class Counsel is not insulated from liability "because [they] complied with the order of the District Court issued to satisfy the due process requirements of Federal Rule of Civil Procedure 23(e)." Petition at 4. However, Zimmer misperceives the significance of the duty to review and approve the notice procedure which is explicitly imposed on the district court by Rule 23. That significance is three-fold.

First, of course, an approval is required precisely so that the question of the adequacy of the notice procedure can be determined. Such approval calls for the sound use of discretion. Of course, no matter what notice procedure might be adopted in a given class action, *someone* could assert after the fact that it was inadequate. There is always "something more" that, in the view of the unhappy class member, could have been done. However, the *res judicata* consequences which attend class action litigation, consequences in which all of the class members

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NOTES *(Continued)*
(3d Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *Hubicki v. ACF Industries, Inc.*, 484 F.2d 519, 524 (3d Cir. 1973). *See also Supermarkets General Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974) (June 1 notice imposed a "duty of due diligence to keep abreast of settlement developments").

and defendants have an interest, cannot be so lightly disregarded. There is a need for both orderliness and uniformity of result. Someone, therefore, must screen the proposed manner of notice and resolve the question of whether it is adequate.

Second, the question of adequacy is specifically remitted to a judge's determination. The language of Rule 23 is unequivocal. Notice is to be given as "the *court* shall direct," "the *court* may direct" or "the *court* directs." F.R.C.P. 23(c)(2), 23(d)(2), 23(e). The role of the district court in class action litigation under Rule 23 is not an incidental one. It is pivotal.[21] It has accordingly been repeatedly stated that notice under Rule 23 is "the court's rather than any party's." 3B Moore, *Federal Practice*, ¶23.55 at 23-443 (2d ed. 1985); *Manual For Complex Litigation*, (5th ed. 1982), §1.45 at 45-46.

Third, the question of the manner of notice is to be determined by the court *before* the notice is sent. At the very latest, it must be determined by that court prior to approval of the settlement and the entry of final judgment. Any question as to the sufficiency of the notice then becomes merged into the judgment itself.

In short, the question of what the notice procedure should be is a matter uniquely to be determined in the original class action proceedings. It is *not* a matter to be determined after the fact in a subsequent malpractice action or on a petition for a writ of certiorari seeking the exercise of this Court's power of supervision. Any contrary conclusion would have grave consequences not

21. Zimmer's citation from *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 14-15 (S.D.N.Y. 1980) is irrelevant. As a full reading of that case makes clear, it is only in the *discovery stage* that the class action judge may seek to minimize his or her involvement in the case. Equally inapposite is *Johnson v. Shreveport Garment Co.*, 422 F.Supp. 526, 534 (W.D.La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978), Petition at 7, which addresses the duty of class counsel to vigorously discover and try an employment discrimination class action. At no time has Zimmer ever suggested that Class Counsel failed to vigorously pursue the class' antitrust claims.

only for the finality of the settlement approved in the Antitrust Litigation, but also for the finality of all completed class action settlements and the ability to resolve any future class litigation.

CONCLUSION

For the reasons set forth above, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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